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NO._____

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IN THE SUPREME COURT OF
THE UNITED STATES

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October Term, 1988

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TEXARKANA TRAWLERS, A PARTNERSHIP, ET AL
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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James N. Haltom
A. Paul Miller, III
HUBBARD, PATTON, PEEK,
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Post Office Box 1928
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(214) 794-3341

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## QUESTION PRESENTED

Does equity require that the remedy of rescission be conditioned upon a complete return to the status quo even under circumstances where such a return shifts the loss away from the party guilty of a wrongful inducement and places that loss on the victim of the wrongful inducement?

## PARTIES INVOLVED

The following listed persons have an interest in the outcome of this case.

United States of America, Respondent

Texarkana, Trawlers, a Partnership, Edward Page Oliver, Partner; Gerald H. Teasley, Jr., Partner; Robert S. McGinnis, Sr., Partner; Starkey Smith, Partner; Edward Miller, Partner; Sheila Simpson, Partner; C. Jack Smith, Partner; Barry M. Green, Partner; Charles Bruce, Partner; John Dodge, Partner; Tom Blackmon, Partner; William W. Miller, Partner; Norris Knight, Partner

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## OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals was rendered on June 6, 1988. It is reported at 846 F.2d 297 (5th Cir. 1988). Petitioner's motion for rehearing was denied on July 6, 1988. No district court opinion was

reported. The Findings of Fact and Conclusions of Law of the District Court are attached as Appendix D-1.

## Jurisdictional Statement

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Petitioners seek a writ of certiorari to review the decision of the Fifth Circuit dated June 6, 1988, the petition for rehearing of which was denied by an order dated July 6, 1988.

## Question Presented

Does equity require that the remedy of rescission be conditioned upon a complete return to the status quo even under circumstances where such a return shifts the loss away from the party guilty of a wrongful inducement and places that loss on the victim of the wrongful inducement.

## STATEMENT OF THE CASE

This action was brought by the United States to collect on certain Notes and Guaranties entered into by Texarkana Trawlers, a Partnership, on April 17, 1984, as part of the

refinancing of six shrimping vessels owned by the Partnership. The vessels were financed through the direct loan and loan guaranty programs operated by the National Marine Fisheries Service.

The key event in this dispute is a refinancing through the National Marine Fisheries Service which occurred on April 17, 1984. Based upon certain representations by Thomas Allen, Chief of the Financial Services Branch, National Marine Fisheries Service, the Partnership entered into a refinancing which included individual guarantees of the government's obligations. This refinancing package included the boats of Texarkana Trawlers as well as other owners of boats in a fleet operated by Henry Singleton, Jr. A loan of approximately $327,000.00 was a direct loan through the Fisheries Loan Fund. 16 U.S.C. 742a-c. A loan of

approximately $1,000,000.00 was placed with a private bank, however, was guaranteed by the National Marine Fisheries Service under Title XI of the Merchant Marine Act, 46 U.S.C. 1271-1281.

Many events before this refinancing are relevant to the consideration of this matter. Importantly, a close working relationship existed between the National Marine Fisheries Service and Henry Singleton, Jr., in the operation of his fleets long before the refinancing arrangement of April 17, 1984.

In December of 1982, an agreement was reached between Tom Allen on behalf of the United States Government, and Henry Singleton, Jr., that granted consent to Henry Singleton, Jr., to move the fleet, including the boats owned by the Partnership, to South America.

(Singleton Depo. p. 36). The owners of the vessels were not contacted regarding the proposed relocation nor were they notified of the relocation. (Tr. 239). The vessels were prohibited from leaving the territorial waters of the United States without the express consent of the National Marine Fisheries Service. (Tr. 46-50).

The relocation, with the consent of Tom Allen on behalf of National Marine Fisheries Service began in early 1983. (Singleton Depo. p. 60). By April or May of that year, all of the boats, including those owned by the Partnership had left the territorial waters of the United States. The Partnership boats had a value of at least $245,000.00 and had a replacement cost of $300,000.00. (Singleton Depo. pp. 83-84).

Through the lease agreement by which

the vessels were being operated by an entity under the control of Singleton, all payments were being made directly to the lender by the fleet operator. The loans on Partnership vessels were not delinquent when the vessels were taken to South America, and remained current at least through October of 1983. (Tr. 98).

Tom Allen admittedly knew that the vessels had been moved to South America, and that upon receiving said information he did not notify the owners of the relocation. (Tr. 92, 106). Mr. Allen stated that during the months following the relocation, he never told Mr. Singleton to bring the boats back to the territorial waters of the United States. (Tr. 115-116).

Allen and Singleton mutually agreed during a meeting in December of 1983 that there should be a refinancing of

all debts in the Singleton fleet. (Tr. 116-117). Neither the Partnership nor any individual owners of the vessels that were part of Singleton's fleet were made a part of that agreement and the discussion surrounding it. It was not until March of 1984 that the refinancing plan concocted by Allen and Singleton was mentioned to the Partnership. (Oliver Depo. p. 19). In March of 1984, Ed Oliver, Managing Partner of Texarkana Trawlers, received a letter from National Marine Fisheries Service notifying him that the agency was considering the refinancing all boats in the Singleton fleet, including those owned by Texarkana Trawlers. (Tr. 251). The refinancing could take place only if all boats in the fleet were included. During the course of those discussions, certain representations were made by Mr. Allen to Mr. Oliver. These

representations included that all participants in the refinancing plan would be "treated equally" and that all of the loans were to be under the "same terms and conditions". (Tr. 127, 127, 252-253). The term "package deal" was used.[1]

At the direction of Tom Allen, the vessel's owners were gathered in Houston on April 17, 1984, to enter into the refinancing package in question. That refinancing package included notes, mortgages and personal guarantees. At the time of the refinancing, the vessels owned by Texarkana Trawlers were operating in Guyana, were in excellent

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[1] The Fifth Circuit questioned whether use of the term "package deal" could amount to a misrepresentation. The Fifth Circuit did not discuss the more direct representations that all participants would be "treated equally" and under the "same terms and conditions." The Fifth Circuit's ruling, however, was based on another issue.

condition, and could have been returned to the territorial waters and sold or used in some other manner. Their value was in excess of $200,000.00 each. (Singleton Depo. pp. 150-154).

Unknown to the Partnership, every mortgage on every boat that was part of the refinancing package, other than those owned by the Partnership, were required by the United States Government, acting by and through its representative, Tom Allen, to be personally guaranteed, not only by Henry Singleton, Jr., but also by his wife. (Tr. 134-135). Henry Singleton, Jr., did not want to personally guarantee any of the boats that were refinanced, but was forced to by Tom Allen on behalf of the National Marine Fisheries Service. Singleton was told that every boat had to be part of the refinancing package or that the refinancing would not take

place. The Singleton guarantee of the refinancing loans on the vessels, other than the Partnership boats, was a prerequisite for the refinancing of those vessels.

As a result of the refinancing arrangement which covered seventeen (17) vessels, all vessels other than the 6 owned by the Partnership were subject to the ownership interest, or personal guarantee of Henry Singleton, Jr.

The first payment due through the refinanced loans were to be made in July of 1984. The payments were to be made directly by the fleet operator, Mr. Singleton. The payment was not made and the default occurred while the vessels were in South America. (Singleton Depo. p. 143).

After the July 1984 payment had been missed, Ed Oliver was advised during a telephone conversation with another boat

owner, that Henry Singleton, Jr., had personally guaranteed the note of Tom Edwards and was therefore personally liable for the payment of that mortgage. Oliver contacted Tom Allen for verification and was told "you didn't get it from me, but, yes, he did". In response to Mr. Oliver's complaint that the Trawlers' vessels were put in an adverse position by the fact that they were the only boats not personally guaranteed by Singleton, Allen responded, "I know that and I told Washington about it, but they said go ahead and close it." (Tr. 256-259).

After the default, only some of the boats were returned from the South American ports, the six vessels owned by the Partnership, not being subject to a personal guarantee of Henry Singleton, Jr., were not returned. They remained in the South American ports where they

are of no value at this time. (Oliver Depo. Ex. 1).

At the time of the refinancing, the Partnership had money available to bring the boats back to the United States. Had the Partnership been aware before the refinancing package was closed that the other vessel owners were being protected by guarantees, while the Partnership's loans were not, the Partnership would not have entered into the refinancing. At that time, the boats were of such a value that they could be sold and outstanding debts paid off. The loss to the Partnership would have been approximately $129,043.94. (R. 980-988).

## OPINION OF THE TRIAL COURT

Included among the Findings of Fact and Conclusions of Law of the Trial Court was that the refinancing occurred

on April 17, 1984, and at that time notes to the private bank, Sun Bank Sun Coast N.A. were executed which were guaranteed by the United States Government. Those guarantees were further secured by the personal guarantees of the partners making up the Partnership. Importantly, the Trial Court found that the Partnership would not have entered into the refinancing but for the representations by the National Marine Fisheries Service that all participants would be treated equally and under the same terms and conditions. (Finding of Fact No. 7). The Court found that the National Marine Fisheries Service did require the fleet operator, Henry Singleton, Jr., to guarantee all vessels in the fleet except those owned by Texarkana Trawlers. (Finding of Fact No. 8). The loss sustained by Texarkana Trawlers

and the loss of the vessels directly resulted from their reliance on the misrepresentations on the National Marine Fisheries Service. (Findings of Fact No. 9 and No. 10). Had the Partnership sold the vessels rather than relying on the misrepresentations and entering into the refinancing, and applied the proceeds to debts against the boats, the loss to the Partnership would have been $129,043.94. (Finding of Fact No. 14).

The Trial Court concluded that the representative of the National Marine Fisheries Service had made misrepresentations which were material, and which induced the Partnership to make the notes, mortgages, agreements and personal guarantees that made up the refinancing agreement. The Partnership's reliance on those misrepresentations was justified. The

actions by the Government, therefore, constituted fraud in the inducement.

After finding that the facts of the case established that the Trawlers had been fraudulently induced into entering into the Guaranty Contracts, the Trial Court awarded an equitable remedy. The Trial Court sought to return the parties to the status quo as of the date of the refinancing which Trawlers entered into due to the fraudulent conduct by the authorized representative of the Fisheries Service. At that time, absent the fraudulently induced refinancing, the Trawlers would have sold the boats and applied the proceeds to the existing loans which were outstanding. The sum of $129,043.94 would remain owing to the Government following the application of the loan proceeds. Judgment, therefore, was rendered in favor of the United States Government in that amount.

Implicit in this ruling is that the equitable remedy of rescission may be rendered under certain circumstances even though both parties may not be returned to the status quo. In that event, any loss must fall to the wrongdoer, which in this case was the National Marine Fisheries Service.

FIFTH CIRCUIT COURT OF APPEALS

The Fifth Circuit Court of Appeals reversed and remanded. The Court's ruling was not based upon any disagreement with the findings of fact of the Trial Court. The Fifth Circuit simply held that federal common law does not allow the defense of fraudulent inducement to defeat enforcement of a contract unless all parties are returned to the status quo. The opinion stated:

> "We answer the second question-regarding the return of the status quo - in the negative and reverse on that sufficient

ground alone." United States v. Texarkana Trawlers, 846 F.2d at p. 304.

Petitioners' Motion for Rehearing, arguing that equity does not require that the remedy be conditioned upon returning the wrongdoer to the status quo ante when it would have the effect of denying any remedy to the injured party, was denied by the Fifth Circuit Court of Appeals on July 6, 1988.

## SUMMARY OF ARGUMENT

This Petition places before the Court an important issue regarding the restriction of the equitable powers of the United States District Courts. When fashioning a remedy for a party seeking rescission of a contract on the basis of fraudulent inducement, it has long been within the discretion of equity courts to require that the party seeking rescission return the wrongdoer to the

status quo, especially where the retention of consideration received would unjustly enrich that party. While one of the requirements to be considered by the Court, it has not been treated as an absolute prerequisite. In this case, the Fifth Circuit has determined that federal common law absolutely requires that both parties be returned to the status quo before rescission may be granted even when, as here, the effect is to fully reimburse the wrongdoer, while placing the loss on the victim of the fraudulent inducement.

The Fifth Circuit erred because: (1) equity requires that a remedy be provided for the injured party; (2) federal common law does not provide that a return of the status quo is a prerequisite to the equitable remedy of rescission; and (3) the rules of equity require that if a loss must be suffered,

it must fall on the wrongdoer rather than the victim.

## ARGUMENT - REASONS WHY THE WRIT SHOULD BE GRANTED

The ruling of the Fifth Circuit results from an application of equitable principles in a rigid, technical manner so that the ends of equity are defeated. The Fifth Circuit's sole ground for reversal is that rescission is not available to the party damaged by the fraudulent inducement, the Partnership, because the wrongdoer, Government, could not be restored to the position it was in before the contract was executed.[2]

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[2] The Fifth Circuit, in Footnote 20, suggests that it could dispose of the case on the issue of the delay in rescinding the contract. Petitioner would point out that the facts and issues surrounding this point, including when rescission was first sought, the existence of any prejudice to the Government as a result of any delay, and other factors set forth in Restatement (Contracts) §483, were not pled, not developed at trial, and are not a part of this record, and, therefore, the

According to the Fifth Circuit's opinion, this return to the status quo is a prerequisite to equitable relief.

Under the facts of this case, restoring to the status quo amounts to payment in full to the party guilty of the fraudulent inducement so that the entire loss falls on the victim of the fraudulent inducement. The Government was required to pay approximately $2,000,000.00 to satisfy its obligations to the private bank that provided loan proceeds at the refinancing. The Government now seeks to enforce to the Guaranty Agreements that were obtained as a result of the fraudulent inducement. Requiring the Partnership to reimburse that $2,000,000.00 before rescission is allowed defeats equity. It allows the wrongdoer to retain the

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Appellate Court's assumptions regarding what that evidence might be cannot serve as grounds for reversal.

benefit derived from the wrongful inducement,[3] while it denies any remedy to the victim.

This writ should be granted so that the Court may determine whether the

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[3] The refinancing was necessary to the Fisheries Service for the avoidance of losses that would jeopardize the stability and viability of the various Fisheries loan programs (Title XI and FLF) through which the loans existing before the April 17, 1984, refinancing was made. Mr. Allen, the representative of the Fisheries Service, admitted that it was necessary to take action on the original debts on the boats in the Singleton fleet to avoid massive defaults "which would have been a tremendously large demand on the Government" (Tr. p. 530). Allen was concerned about massive defaults involving dozens of boats financed and/or guaranteed by the Fisheries Service. Allen concocted the refinancing package of April 17, 1984, which produced funds to pay off the Title XI and FLF notes which the Fisheries Service had guaranteed. (Tr. p. 206). The evidence was clear and unchallenged that every boat in the Singleton fleet, including those boats owned by the Trawlers, had to be part of the refinancing package or that refinancing could not take place. (Singleton deposition, p. 213). The Trawlers' participation was essential to Mr. Allen's plan.

equitable remedy of rescission carries with it an absolute prerequisite of returning all parties to the status quo whether the result is equitable or not, or whether the remedy remains subject only to the Trial Court's broad equitable powers to fashion a remedy appropriate to the facts of each case.

I. Equity Suffers No Right to be Without a Remedy.

The Fifth Circuit's ruling accepts the District Court's finding that a wrong had been committed, yet denied any remedy to the injured party. It is a well accepted maxim that "equity will not suffer a wrong to be without a remedy." Walters v. Marathon Oil Co., 642 F. 2d 1098 (7th Cir. 1981); St. Paul Fire and Marine Insurance Co. v. Cox, 583 F. Supp. 1221 (N. D. Ala. 1984); Jones v. Glitsch, Inc., 489 F. Supp. 990 (N. D. Tex. 1980).

It is the historic purpose of equity

to secure complete justice. The courts are to adjust the remedies so as to grant the necessary relief. Walters v. Marathon Oil Co., 642 F.2d 1098 (7th Cir. 1981); Equal Employment Opportunity Commission v. General Telephone Company of Northwest, 599 F.2d 322 (9th Cir. 1979), aff'd, 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980); Levitt Corporation v. Levitt, 593 F.2d 463 (2nd Cir. 1979). The courts must look to the practical realities involved in reconciling competing interests in determining "the special blend of what is necessary, what is fair and what is workable." Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

In the current case, the Trial Court reasonably construed and applied the requirements surrounding the equitable remedy of rescission. In accordance

with those requirements, a remedy was granted even though full restitution to the wrongdoer was not possible. The Court required the injured party, the Partnership, to rid itself of all benefits received and therefore guarded against any unjust enrichment. The resulting loss, if any, was properly laid upon the wrongdoer. This remedy was appropriate under the facts, supported by the law, and required by the equitable principles which guided the Court.

II. Federal Common Law Does Not Provide that a Return to the Status Quo is a Prerequisite to the Equitable Remedy of Rescission.

The Fifth Circuit declared that both parties must be returned to the status quo in order for rescission to be available as a remedy. Return to the status quo is declared to be a prerequisite for rescission. The Fifth Circuit's ruling was in error. Courts

of equity are not bound by such rigid requirement. Flexibility is one of the hallmarks of equity. Equity involves the rejection of rigid rules to accomplish what is fair and just in a particular situation. "There can be no established rules and fixed principles laid down for its application without destroying its very existence and reducing it to the positive law." Aetna Casualty & Surety Co. v. Jeppesen & Co., 440 F. Supp. 394 (D.C. Nev. 1977).

In many instances, equity requires that a return to the status quo be effected before rescission may take place, however, it is not an absolute prerequisite. A great many exceptions exist. The learned treatises on this subject make this clear:

> C.J.S. §438 -- Restoration of Status Quo. The restoration of the status quo of the parties is, as a general rule, necessary for a rescission of a contract, but absolute and literal

> restoration is not required if all that is reasonably possible and demanded by the equities of the case is done. (Underlining added.)
>
> The requirement of restitution is not an absolute rule, particularly in the case of fraud and the rule is not to be strictly construed but is to be applied in accordance with equitable principles and the rescinding party is required to do merely that equitably he ought to do. 17A C.J.S. §439. (Underlining added.)

Williston's Treatise on Contracts states that where on the particular facts it seems equitable to allow rescission without complete or perfect restoration of consideration, the modern tendency is to allow the relief. 5 Williston, Contracts §1530 (Rev. Ed. 1937).

Rescission is available even though return to the status quo is impossible, or is inequitable, if the clearest and strongest equity imperatively demands it. Grymes v. Sanders, 93 U.S. 55, 23

L. Ed 798 (1876); Cooley v. Stoeffler, 92 N. E. 2d 926 (Ind. App. 1950); Dobie v. Sears, Roebuck & Co., 180 S. E. 289 (Va. 1935); Jicarilla Apache Tribe v. Andrus, 687 F. 2d 1324 (10th Cir. 1982).

Hundreds of cases suggest that rescission in equity will be allowed even if complete restoration to the status quo cannot, or should not, be had. Bellefeuille v. Medeiros, 139 N. E. 2d 413 (Mass. 1957); Delta Investing Corp. v. Moore, 366 F. 2d 516 (6th Cir. 1966); Sanders v. General Services Corp., 659 F. Supp. 1042 (E. D. Va. 1987).

Cases interpreting and applying the Federal Truth in Lending Laws make it abundantly clear that rescission does not absolutely require that all parties be returned to the status quo. Those statutes make rescission available to borrowers if lenders fail to meet certain disclosure requirements. Courts

have frequently been asked to determine whether the borrower must return the loan proceeds to the lender in order for the borrower to receive rescission. Those decisions are to be based upon common law equity principles. Brown v. National Permanent Federal Savings & Loan, 683 F. 2d 444 (D.C. Cir. 1982). Many of the cases hold that the borrower is not required to tender the loan proceeds to the lender as a condition for rescission. The return of the object of the loan, or its value, is sufficient to rid the aggrieved party of any unjust enrichment and make rescission available. In Brown, supra, rescission was to be conditioned on the return of the fair value of the work actually done on the obligor's home. That fair value was claimed to be only a fraction of the actual loan proceeds. In Rudisell v. Fifth Third Bank, 622

F.2d 243 (6th Cir. 1980), the loan was rescinded and the borrower required to tender only the value of the aluminum siding purchased with loan proceeds. "In this way the court most nearly put the appellants in the position they were in before they entered into the transaction." Rudisell, at 254. [See also, Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974) -- return of the aluminum siding restored, as much as possible, the status quo ante.] Only if the lender was not involved with the activity which led to the borrower's complaints (faulty aluminum siding, etc.) was the tender of loan proceeds made a condition of rescission by the Trial Court. LaGrone v. Johnson, 534 F.2d 1360 (9th Cir. 1976). These cases make clear that restoration may be ordered by the court of equity, but is not a prerequisite to a rescission

remedy. If, as in the present case, the restoration would run to a party that participated in a fraud, or other wrongdoing, the equities suggest that restoration should not be ordered.

Equity has long recognized that the unavailability of a remedy at law for damages is an extremely important consideration in determining whether the equities require the equitable remedy of rescission, even though both parties cannot be returned to the status quo. Blake v. Pine Mountain Iron and Coal Company, 76 F. 190 (6th Cir. 1893). In the present case, the facts proved at trial, and unmoved on appeal, would justify a tort award of damages. Unfortunately, no damages may be awarded due to the Federal Tort Claims Act. Equitable principles may still apply to allow relief to the injured party. Since the equities in the current case

are so strongly with the Partnership, a remedy is necessary.

When applying the equitable remedy of rescission, courts frequently provide, as part of an equitable remedy, that a return to the status quo is necessary. In this case, however, the purposes of equity could not be accomplished if both parties were returned to the status quo.

As previously stated, a court, through its equitable powers, is required to give relief if "the clearest and strongest equity imperatively demands it." Under the facts of this case, the clearest and strongest equity did imperatively demand that relief be granted to the victim of the fraudulent misrepresentation. The ruling of the Trial Court directed that the Trawlers pay damages to the United States Government in the amount of

$129,043.94., By payment of that sum, the Partnership suffered a loss equal to that it would have suffered even had it not entered into the refinancing package. Therefore, the District Court's remedy fulfilled the rule's purpose of avoiding unjust enrichment.

III. Rules of Equity Require that the Loss, if any, Must Fall on the Wrongdoer- a Fraud Must Not Be Rewarded.

The result of the Fifth Circuit's decision is that the party found to be guilty of fraudulently inducing the Partnership into entering into the agreements in question is fully reimbursed while the party who was the victim of the wrongful conduct suffers the loss. The wrongdoer is rewarded. The victim of the wrong is punished.

The rules of equity are not to be applied in an overly technical manner so as to work an inequity. As one state Supreme Court has noted, equity abhors

fraud and diligently seeks to prevent it or redress it where found. "Only the most distorted interpretation of equitable principles would permit one who has deliberately deceived and misled ... to successfully utilize [equitable principles] to sanction and enforce his fraudulent claims." State ex. rel. Burk v. Oklahoma City, 522 P. 2d 622 (Okla. 1973).

Here the Fisheries Service, adjudged guilty of fraudulent inducement, seeks to deny any remedy to the victim of its fraud. The rules of equity, however, require that equitable principles be applied so as to provide a remedy to the wronged party.

The rules of equity require that the loss, if any, must fall on the wrongdoer who made the misrepresentation that led to the loss. Barrer v. Women's National Bank, 761 F. 2d 752 (D.C. Cir.

1985). Equity does not allow the wrongdoer to retain the benefits of his fraud, while forcing the victim of the fraud to suffer the loss.

## CONCLUSION

For all the reasons stated above, this Court should issue a writ of certiorari to review the opinion and judgment of the Fifth Circuit.

Dated: Texarkana, Texas
October 3, 1988

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were forwarded on October 3, 1988, be United States mail, postage prepaid, to Mr. Richard K. Willard, Assistant Attorney General, Mr. Robert J. Wortham, United States Attorney, Ms. Mee Lon Lam, Trial Attorney, Civil Division, Torts Branch, U. S. Department of Justice, Post Office Box 14271, Washington, D.C. 20044-4271, counsel for Respondent, and to Mr. Leonard Schaitman and Ms. Susan Sleater, Attorneys, Appellate Staff, Civil Division, Room 3617, U.S. Department of Justice, Washington, D.C. 20530.

A. Paul Miller, III

# APPENDIX

**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

No. 87-2508

UNITED STATES OF AMERICA,
Plaintiff-Appellant

vs.

TEXARKANA TRAWLERS, a Partnership, et al
Defendants-Appellees

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June 6, 1988

Appeal from the United States District Court for the Eastern District of Texas.

Before GARZA, HIGGINBOTHAM and SMITH, Circuit Judges.

I.

The government, through the Service, operates several direct loan and loan guaranty programs under Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271-79b, and section 4 of the Fish & Wildlife Act of 1956, 16 U.S.C. § 742c. These loan programs exist, in part, to

promote the American fishing industry. Trawlers, a member of that industry, assumed over $1,350,000 in pre-existing loans under these programs when Trawlers bought seven shrimping trawlers in June 1982.[1]

The terms of the loans assumed by Trawlers, which included loans the government had made and others it had guaranteed, were complex. Each of Trawlers' boats was individually mortgaged, and each loan which Trawlers assumed was individually secured by one of Trawlers' boats. Each of the guaranteed loans was particularly intricate, since each of Trawlers' partners and the government had guaranteed each of these loans. The

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[1] Of the loans Trawlers assumed, over $1,000,000 was in commercial loans the government guaranteed, and over $350,000 was in loans the government provided directly.

maze of terms these guaranteed loans created is central to Trawlers' defense. Consequently, we now describe the government loan guaranty program in more detail.

The Service administers the program under Title XI of the Merchant Marine Act. When the Service guarantees a loan under Title XI, it requires the debtor to guarantee that same loan to the Service. The Service also investigates the financial condition of the fishing concern receiving the loan, and refuses to guarantee loans if the debtor is financially unable to pay off the loan. Through these arrangements, the Service can protect its position, since it can attempt to recover from the debtor any amounts which it is called upon to pay the bank pursuant to the government guaranty. Consequently, Title XI creates a "triangular" system of

contractual relationships: The debtor exchanges its guaranty for the government's guaranty to the bank, and the bank exchanges its money for the debtor's promissory note, a security interest in the debtor's vessels, and the government's guaranty.

With their finances thus arranged, Trawlers set their boats to the business of fishing. Trawlers, however, did not itself operate the boats, but leased them to others to operate. Trawlers eventually leased six[2] of its vessels to Henry Singleton, a shrimp fisherman who operated a fishing fleet of twenty to twenty-five shrimpers, including the Trawlers' ships. Singleton owned some of these craft himself and leased others.

Unfortunately, Singleton was not a

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[2] The seventh boat was lost when the Colombian government confiscated it.

successful fisherman. His fleet first ran into economic difficulty in American waters. Trying to change his luck, he moved the fleet, without notifying Trawlers,[3] to Brazil. Fishing Brazilian waters did not prove economically feasible either, and most of the owners of the Singleton vessels--including Trawlers--defaulted on their loans in 1983. Default, however, did not destroy Singleton's operations.

Sometime in 1983, Singleton began negotiating a refinancing package with the Service's agent, Thomas Allen.[4]

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[3] The parties dispute whether Singleton asked the federal government for permission to move the fleet to Brazil. For the purposes of this appeal, however, this point is irrelevant.

[4] At the time of trial, Allen was the chief of the Financial Services Branch for the Southeast Region of the Service, one of five regions into which the Service is divided nationally. Allen was in constant contact with both Singleton and Trawlers throughout the

Allen and Singleton ultimately agreed to seek refinancing for the Title XI loans from a single lending institution for at least seventeen of the fleet's ships, including all of Trawlers' vessels. The more shrimpers Singleton and Allen could "package" together, the lower the risk a single lending institution would assume for refinancing the craft. The lower the risk assumed, Allen and Singleton reasoned, the lower the interest rate they could secure to refinance the fleet.

To refinance that many ships, however, Allen needed to secure the assent of all the owners. Since six of the seventeen vessels which Allen and Singleton wanted to refinance belonged to Trawlers, Allen contacted Trawlers' managing partner, Edward Page Oliver.

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entire relevant period.

Oliver, it turned out, was not inclined to refinance Trawlers' boats. Singleton had not informed Oliver or any other Trawlers partners that Singleton had sailed to Brazil. Oliver apparently thought that fishing in South American waters was risky,[5] and he did not trust Singleton to protect Trawlers' vessels from that additional risk. For such protection, Oliver preferred to recall the ships to the United States, resell them,[6] and pay off Trawlers' debt. Oliver claims that he opposed refinancing plans until after his conversations with Allen in March 1984.

Oliver was impressed with what Allen had to say, and Allen succeeded in

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[5] *See supra* n. 3.

[6] The district court found that each of Trawlers' six boats was worth $200,000 at the time Trawlers refinanced the ships.

convincing Oliver that a refinancing package deal was the best chance Trawlers had of rebounding from default. Allen told Oliver that he could work out a "package deal" with a single bank and that the interest rates on the loans would be lower than Trawlers could otherwise obtain. Allen also told Oliver that the deal for all the owners would be under the same terms and conditions.

Oliver interpreted Allen's statements to mean that all the terms and conditions of the *security* agreements would be the same. But Allen apparently meant only that all of the terms and conditions (such as the interest rates, amounts of payments, and frequency of payments) of the *loan* agreements would be the same.[7] Oliver,

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[7] Our decision in this case does not turn on what meaning Allen in fact intended to convey when he said that the

believing that all the boats were secured on identical terms and conditions, agreed to refinancing. On April 17, 1984, all of the owners convened in Houston and closed the deal.

The refinancing arrangement, however, did not secure all loans equally. Each of the loans was secured by a boat, by a government guaranty, and by a guaranty from the owner of the

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"package deal" would put the owners "all under the same terms and conditions". Intent is not an element of Trawlers' defense of fraud in the inducement of the refinancing contracts. *See* Restatement (Second) of Contracts §§ 162, 164, *See generally id.* §§ 159 et seq. We suggest this interpretation of the March 1984 Oliver/Allen conversations *only* to emphasize that parties to complex financial deals can easily misunderstand each other. Additionally, we note that the district court ignored the question of intent and made only the conclusory "finding" that Allen's statement "was a misrepresentation of a material fact and a fraudulent misrepresentation." Op. at 27.

boat secured.[8] Owner and fisherman Singleton, however, also guaranteed all the loans, *except Trawlers' loans*, secured by boats he did not own.[9] Consequently, Singleton could protect himself from foreclosure only if those vessels could be resold. Singleton therefore had a powerful economic incentive to prefer to preserve *non-Trawlers* boats if he ever had to decide which part of the fleet to save.

Subsequent events served only to worsen Trawlers' position. In July 1984, Singleton stopped lease payments to Trawlers, and Trawlers stopped paying

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[8] The government's guaranties ran to the bank that loaned the refinancing money. The owners' guaranties, however, ran to the government to protect the latter in the event it had to pay off some loans.

[9] Apparently, several of the other owners were financially unstable, and the government refused to guarantee their loans unless Singleton guaranteed those loans as well.

on its loans. In August 1984, Oliver first discovered that the other ships in the fleet were better secured than Trawlers' boats. Eventually, Singleton folded his fishing operations, and all the craft, except Trawlers', returned to the United States. The bank defaulted Trawlers on its loans and enforced the government's guaranties. The government in turn foreclosed its security agreements with Trawlers. Trawlers, which could not rely upon the equity in its shrimpers to satisfy the government's demands,[10] refused to honor

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[10] The district court found that "[Trawlers] suffered injury as a result of their reliance on the [Service's] misrepresentations in that [Trawlers'] vessels were subjected to substantial risk that would not have existed had the refinancing arrangement been as represented .... The risks imposed upon [Trawlers'] as a result of the [Service's] fraudulent misrepresentations resulted in the complete loss of [Trawlers'] vessels." Op. at 27. To understand why Trawlers could have returned its six vessels to the United States in April 1984 but no

its guaranties to the government.

The government sued Trawlers for breach of Trawlers' guaranty contracts and for defaulting on the loans the Service had made directly to Trawlers.[11] Trawlers alleged, as an affirmative defense, that it should not have to reimburse the government because the government had wrongfully induced

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longer can, we must turn to the record. It suggests that the Brazilian company whose docks Singleton used for his fleet, Ipecea, acquired a lien sometime after April 1984 against Trawlers' boats. Ipecea seized control of the boats and has allowed them to deteriorate rapidly until the vessels are no longer seaworthy. Ipecea apparently refuses to release the boats or do anything to refurbish them until someone pays Ipecea the debt owed it. Moreover, unseaworthy boats are also uninsurable, and the boats apparently are no longer capable of returning to the United States without major repairs.

[11] As of October 1986, Trawlers owed the government $1,750,120.23 for the guaranteed loans the government paid off and $407,879.79 for the loans the Service made directly to Trawlers. Although its math seems slightly inaccurate, the government is currently seeking $2,158,000.00 from Trawlers.

Trawlers to enter into the refinancing contracts. The district court ruled for Trawlers,[12] and the government appeals.

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[12] The district court's conclusions of law are short, and we therefore reproduce them here in substantial part:

> The statements by the duly authorized agents of the [Service] to the effect that all participants in the refinancing agreement devised and designed by the National Fisheries Service would be treated equally and under the same terms and conditions was a misrepresentation, that was material and/or fraudulent, that induced [Trawlers] into making the Notes, Mortgages, Agreements and Personal Guaranties that made up the refinancing agreement. [Trawlers'] reliance on such misrepresentations was justified. The actions by the [Service] constituted fraud in the inducement and resulted in damages to [Trawlers]. The Notes, Mortgages, Agreements and Personal Guaranties, therefore, may not be enforced by the [Service] against [Trawlers]. Restatement (Second Contracts, §§ 159 through 173, Introductory Note; 17 Am. Jur. 2d "Contracts" § 151; *Homelite v. Trywilk Realty Co.*, 272 F. 2d 688 (4th Cir. 1959); *Fredonia Broadcasting Corporation, Inc. v. RCA Corporation,* 569 F. 2d 251, (5th Cir.), *cert. den.*, 439 U. S. 859, 99 S. Ct. 177, 58 L. Ed. 2d 167 (1978); *Stone v. Lawyers Title Insurance Corporation,* 554 S. W. 2d 183 (Tex.

II.

The government urges us to consider several issues raised under the FTCA[13] and the federal common law of

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1977)....
The Personal Guaranties signed by the [Trawlers' partners] are not enforceable by the [Service] because the [Service] was a participant in the fraud that led to the execution of the Personal Guaranties. *Standard Surety & Casualty Co. v. Olson*, 150 F.2d 385 (8th Cir. 1945); *United States v. Basil's Family Supermarket, Inc.*, 259 F.Supp. 139 (S.D. N.Y. 1966); *First Nat. Bank, Henrietta v. Small Business Admin.*, 429 F.2d 280 (5th Cir. 1970).

Op. at 28. The district court voided the refinancing agreement, allowed Trawlers to keep the money it had gained under that agreement, and awarded Trawlers $1,200,000 as a set-off to Trawlers' remaining debt to the Service. (The $1,200,000 set-off represents money Trawlers would have raised from the sale of its six vessels in April 1984. *See supra* n. 7.)

[13] The government asserts that the FTCA (28 U.S.C. §§ 1346(b), 2671) bars *affirmative defenses* against the United States based upon fraud as well as *claims* against the United States based upon fraud. Although the plain language of the Act covers only claims, we do not reach this issue today.

contracts.[14] Having carefully considered the government's arguments and Trawlers' responses, we have concluded that this case turns on two of those issues: First, did Trawlers have

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[14] Both parties agree that federal law governs the refinancing contracts at issue. We merely reiterate what we said in *United States v. Little Joe Trawlers*, 776 F.2d 1249, 1251 (5th Cir. 1985), a case that examined the government's attempts to enforce private guaranties under one of the programs involved in this case:

> We sound a warning to future litigants in contract suits where the United States is a party that federal law governs the rights and duties of the United States on commercial paper. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943).... In this circuit, relying on *Clearfield Trust*, we have ruled that federal law governs a guaranty contract entered into by the United States. *First Nat. Bank, Henrietta v. Small Business Admin.*, 429 F.2d 280 (5th Cir. 1970). The desire for uniformity of decisions was a factor in *Henrietta, id.* at 286, and it should be a factor in adjudicating the United States' rights in suits like this one, arising as a result of the government's role in facilitating loans under Title 11 of the Merchant Marine Act.

the legal right to rely upon Allen's characterizations of the "package deal", or did Trawlers instead have a duty to investigate further the terms of the security agreements?[15] Second, can rescission return the parties to the *status quo ante* after the United States has performed fully its guaranties and paid off Trawlers' loans? A negative answer to either question requires

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[15] To establish the defense of wrongful inducements, Trawlers must prove

> 1. That the government's representation was false;
> 2. That the government's representation was material;
> 3. That the misrepresentation operated as an inducement to [Trawlers to enter] into the contract;
> 4. That [Trawlers] had the legal right to rely on its accuracy; [and]
> 5. That [Trawlers] did in fact rely on the representations to [its] injury.

B. McBride & T. Touhey, *Government Contracts* § 13.30.

reversal of the judgment below.[16]

On the first issue, the district court accepted Trawlers' argument that it relied justifiably upon Allen's statements, but the court apparently did not consider the level of ambiguity inherent in the Allen/Oliver phone calls.[17] In light of that ambiguity, a reasonable person could easily doubt Trawlers' characterization of the phone calls, in which the terms used were simply too broad and imprecise to serve as anything more than an invitation to deal with the government. We question whether, when the most precise term used ("package deal") in initial negotiations

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[16] The district court concluded that Trawlers relied justifiably upon the Service's misrepresentations, and awarded Trawlers (i) rescission of the refinancing contracts, (ii) the right to keep the money it obtained under the refinancing contracts, and (iii) $1.2 million for Trawlers' six lost vessels. *See supra* n. 13.

[17] *See infra* n. 19.

is inherently ambiguous, either party can rely justifiably solely upon what the other party has said, without a duty of further inquiry.[18]

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[18] Indeed, "package deal" is so ambiguous a term that we suspect that what Allen meant was not what Oliver thought Allen meant. Allen testified at trial that when he said the refinancing deal was a "package deal", he meant that the *loan* terms would be identical for all the boat owners. Oliver testified that he understood Allen to mean that *all* the terms, including the terms of the security agreements, would be identical.

> Where the information recipient misunderstands what the information provider meant, there is no misrepresentation at all. Misunderstandings may be mistakes, but they are not misrepresentations. However, we cannot decide this case on the issue of whose meaning prevails. The district court found only that Allen's statement "was a misrepresentation of a material fact and a fraudulent misrepresentation." Op. at 27. This finding does not indicate whether the district court simply did not believe Allen's testimony, or erroneously included misunderstandings in its definition of misrepresentations. We are unwilling to overturn a district court's findings that may be based upon a witnesses' credibility.

*See Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 826 F.2d 424 (5th Cir. 1987) (defendant not liable for fraudulently misrepresenting quality of oil sold where, unlike a reasonable participant in the oil industry, plaintiff failed to recognize that defendant based its test report statements upon composite figures representing several oil quality tests). We need not decide this issue, however, since we answer the second question-regarding return to the *status quo ante*-in the negative and reverse on that sufficient ground alone.

III.

Trawlers' defense fails because the defense of wrongful inducement is no longer available to Trawlers to defeat or diminish the government's claim for breach of contract. A contract defendant pleading the defense of

wrongful inducement is asserting that it agreed to one or more contractual provisions only because the plaintiff misled the defendant into believing untrue statements. Under familiar terms of the common law of contracts, the party who has been wrongfully induced to accept objectionable contractual terms is unable to give its informed consent to those provisions. Consequently, the defendant may avoid performing its obligations under any terms to which the plaintiff has wrongfully induced the defendant to consent. Such action on the defendant's part amounts to "termination" of the contract while it is executory. If the plaintiff has wrongfully induced the defendant to consent to the contract itself, the defendant may rescind the entire contract.

Rescinding a contract because it was

wrongfully induced, however, is not the same as suing for fraud. The *defense* of wrongful inducement is only a shield against the plaintiffs' breach-of-contract claim, *not* a sword which the defendant can use to claim damages against the plaintiff. Awarding damages, especially reliance damages, converts the *defense* of wrongful inducement into a positive *claim* based upon the government's deceit. *Cf. First National Bank, Henrietta v. S.B.A.*, 429 F.2d 280, 287 (5th Cir. 1970) (*quoting* Restatement (Second) of Torts § 552) (actions for misstatements in the guaranty context sound in tort). However, the FTCA bars *claims* for fraud against the federal government. *E.g., United States v. Neustadt*, 366 U.S. 696, 81 S.Ct. 1294, 6 L.Ed.2d 614 (1961). Consequently, the district court improperly awarded Trawlers $1.2 million

for the vessels it lost after it entered into the refinancing agreement.

Moreover, the court improperly allowed Trawlers to retain the loan money Trawlers obtained under the refinancing contracts. Rescission, unlike termination, requires the parties to "unmake" the contract. Rescission, as the government correctly argues, attempts to restore the parties to the rescinded contract to the *status quo* that existed before the contract was formed. *See New York Mail & Newspaper Transportation Co. v. United States*, 139 Ct. Cl. 751, 154 F. Supp. 271, 275 (Reed, J., sitting by designation), *cert. denied*, 355 U. S. 904, 78 S. Ct. 332, 2 L. Ed. 2d 260 (1957). The parties can restore each other to the *status quo ante* only if they can restore to each other what each took under the rescinded contract. If it is impossible to insure

that all property exchanged is returned, then the contract cannot be rescinded. *See Treasure Salvors v. Unidentified Wrecked & Abandoned Sailing Vessel*, 459 F. Supp. 507, 523 (S. D. Fl. 1978) (applying Florida law), *aff'd sub nom. Florida v. Treasure Salvors*, 621 F. 2d 1340 (5th Cir. 1980), *rev'd on other grounds*, 458 U. S. 670, 102 S. Ct. 3304, 73 L. Ed. 2d 1057 (1982). *See also Dahl v. United States*, 695 F. 2d 1373, 1382 (Fed. Cir. 1982). Even the party seeking rescission must return whatever property it has received under the rescinded contract. *Id.*; 17A C. J. S. Contracts § 439.

Obviously, it is easiest to rescind a contract that governs only the parties' rights in tangible property. If, on the other hand, one of the parties has alienated intangible things, such as services, then the benefactor

cannot return the property. At best, a court can only value the intangible property rendered and order the receiving party to "return" to the rendering party the cash value of the property received. *Cf. Caribbean Insurance Services v. American Bankers Life Assurance Co.*, 754 F. 2d 2 (1st Cir. 1985) (under Puerto Rican law, party receiving services must pay equivalent value for the services received under a rescinded contract.)

Only with great difficulty may the receiving party rescind a services contract the rendering party has fully executed. Some states, such as Louisiana, solve this problem by refusing to allow parties to rescind contracts which one side has performed fully. In *Gregson v. United Life & Accident Insurance Co.*, 629 F. 2d 1075 (5th Cir. 1980), for example, this court

applied Louisiana law and refused to rescind an insurance broker's contract. The broker, with the company's approval, had sold life insurance to a high-risk customer for low-risk rates. After the company realized its error, it refused to pay the broker his fee. The broker sued, and the insurance company sought to rescind the brokerage contract on the ground that mutual mistake invalidated the insurance contract. We held that Louisiana law barred rescission of a contract which one side has performed fully, and that the broker had performed fully his services. We consequently denied the insurance company's defense.

Louisiana's rule appears to us to have achieved a just result in *Gregson*. Rarely can a court measure the value of intangible property by anything other than the contract to which the parties agreed. Consequently, we believe that

courts should only rarely, if ever, rescind a service contract to the detriment of a party that has performed fully.

Nonetheless, we need not, and we do not, adopt the Louisiana rule here. The facts of this case present even stronger reasons to refuse to allow Trawlers the right to rescind these contracts. Under the refinancing contracts, the government undertook only one duty: to pay off Trawlers' refinanced loans should Trawlers default. That single duty, which the government has performed fully and in good faith without receiving anything in return, ran to the lending bank, not to Trawlers. To allow Trawlers to rescind its guaranties to the government would be to distribute the complex contractual relationships, which no single contract defines, among *three* parties (Trawlers, the Service,

and the bank). Moreover, Trawlers benefited from its contracts with the government not because of the inherent value of government guaranties, but because those guaranties bought loan proceeds which Trawlers desperately needed. If Trawlers had rescinded the contracts before the government honored its guaranties to the bank, Trawlers would have had to return its loan money to the bank. The only reason Trawlers no longer owes money to the bank is that the government has performed its contractual duties faithfully and fully. Trawlers' obligations have not changed simply because it now owes money to the government instead of to a bank.

Moreover, even if the government's misrepresentation were held to reduce what Trawlers owes the government, we note that Trawlers delayed rescinding the contract for a full year, and thus

prejudiced the government's position. Trawlers discovered the alleged misrepresentation in August 1984, but failed to seek rescission until August 1985. Had Trawlers rescinded its contracts with the government *before* the Service paid off Trawlers' loans, the government could have taken measures to protect itself. Trawlers, however, waited until the government actually had honored its guaranties and had paid the bank over two million dollars. Because Trawlers' inaction for a full year severely prejudiced the government, we believe it is no longer possible for Trawlers to return the government, we believe it is no longer possible for Trawlers to return the government to the position it enjoyed before it guaranteed Trawlers' refinancing package. We hold, therefore, that Trawlers can no longer

rescind the guaranty contracts.[19]

IV.

The district court found that, as of the first day of its bench trial (October 27, 1986), Trawlers owed the government $407,879.77 under the

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[19] This case illustrates why American contracts law uniformly requires a party claiming wrongful inducement to seek rescission shortly after discovering the misrepresentation. *See Regional Properties v. Financial & Real Estate Consulting Co.*, 752 F.2d 178 (5th Cir. 1985) (applying Texas law); *Baker v. Penn Mutual Life Ins. Co.*, 788 F.2d 650 (10th Cir. 1986) (applying Kansas Law); *Mariner Water Renaturalizer v. Aqua Purification Systems*, 665 F.2d 1066 (C.D. Cir. 1981) (applying District of Columbia Law). *See also* 12 S. Williston, Williston on Contracts § 1460 (3d ed. 1970). It is simply unfair for one party to acquire an indefinite, unbargained-for right to rescind a contract which the other party must continue to perform. Indeed, had the government argued that Trawlers failed to act soon enough to rescind the contracts, we could have disposed of this case on this issue alone. Neither the district court nor this court, however, has heard the government object to Trawlers' long delay in asserting its right to rescind these contracts. Consequently, we are unable to apply this rule here.

Service's direct loan program. This finding is not clearly erroneous, and we affirm it. On remand, we direct the district court to enter judgment in the government's favor on the direct loans for $407,879.77, with interest as provided by law.

Because the district court held that Trawlers could avoid its obligations under the refinancing contracts, the court never determined the outstanding balance of Trawlers' guaranteed loans. On remand, the district court should determine this balance as of October 27, 1986, and enter judgment for the government accordingly with appropriate provision for any interest.

The judgment of the district court is REVERSED, and this matter is REMANDED to the district court for further proceedings not inconsistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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NO. 87-2508

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THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

TEXARKANA TRAWLERS, A Partnership, ET AL.,
Defendants-Appellees

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Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING
( July 6, 1988 )

Before GARZA, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE UNITED STATES OF AMERICA,
Plaintiff

VS. CIVIL ACTION NO. TX-85-142-CA

TEXARKANA TRAWLERS, a Partnership, EDWARD PAGE OLIVER, GERALD H. TEASLEY, JR., ROBERT S. McGINNIS, SR., STARKEY SMITH, NORRIS C. KNIGHT, JR., EDWARD MILLER, SHELIA SIMPSON, C. JACK SMITH, BARRY M. GREEN, CHARLES BRUCE, JOHN DODGE, TOM BLACKMON and WILLIAM W. MILLER,
Defendants

JUDGMENT

This action came on for trial before the Court and the evidence and supporting briefs having been furnished the Court, and the Court having entered its Findings of Fact and Conclusions of Law,

IT IS ORDERED and ADJUDGED that the Plaintiff have judgment against the Defendants for the outstanding balance of the 6th FLF Mortgages and Notes as of April 17, 1984, less the sum of One

Hundred Ninety-Eight Thousand Three Hundred Thirty Dollars ($198,330.00), for a balance owing of One Hundred Twenty-Nine Thousand Forty-Three and 94/100 Dollars ($129,043.94), plus interest at the rate of nine and 09/100 percent (9.09%) until date of Judgment, plus interest on a total amount of said Judgment from the date of Judgment until paid at the rate of ten percent (10%) per annum; and that the Plaintiff take nothing from the Defendants on the refinancing of Title XI loans; and that the cost of this action be taxed against the Plaintiff herein.

SIGNED this the 12 day of March, 1987.

/s/
JOE J. FISHER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA

VS. CIVIL ACTION NO. TX-85-142-CA

TEXARKANA, TRAWLERS, A PARTNERSHIP, EDWARD PAGE OLIVER, GERALD H. TEASLEY, JR., ROBERT S. McGINNIS, SR., STARKEY SMITH, NORRIS C. KNIGHT, JR., EDWARD MILLER, SHEILA SIMPSON, C. JACK SMITH, BARRY M. GREEN, CHARLES BRUCE, JOHN DODGE, TOM BLACKMON and WILLIAM W. MILLER

Honorable Richard K. Willard
Assistant Attorney General

Honorable Robert J. Wortham
United States Attorney

Honorable Ruth Harris Yeager
Assistant U. S. Attorney

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this cause of action, Plaintiff seeks collection of principal and interest due through certain Promissory Notes, some of which were entered into on April 17, 1984, as part of a refinancing program under Title XI of the Merchant Marine Act (Title XI) and some of which were issued under the Fisheries Loan Fund (FLF). Defendants assert by way of affirmative defense that the Notes, Mortgages and Personal Guaranties that were part of the refinancing of the Title XI notes and which are sued upon would not have been entered into but for certain misrepresentations by the representatives of the Plaintiff which constituted fraud in the inducement

which is a complete defense to the Plaintiff's cause of action. In addition, Defendants assert that their default on the FLF Notes resulted from the refinancing arrangement not being as it was represented to be.

Pursuant to Rule 52, Federal Rules of Civil Procedure, the Court, having considered all of the evidence and the arguments of counsel, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

Texarkana Trawlers is a Texas partnership formed under the laws of the State of Texas. Each of the named individual Defendants in this lawsuit is a general partner of Texarkana Trawlers. Edward Page Oliver is, and was at all pertinent times, the managing partner of Texarkana Trawlers, and the personal

representative of the individual Defendants.

2.

Thomas S. Allen was at all pertinent times an employee of the U. S. Department of Commerce, and functioned as Chief of the Financial Services Branch of the National Marine Fisheries Services and was acting within the scope of his employment. As such, Mr. Allen was an agent of the Plaintiff.

3.

In 1979, Buck Simpson, now deceased, executes six Preferred Ship Mortgages under Title XI of the Merchant Marine Act (Title XI), 46 U.S.C. §§ 1271-1281, for each of the six SHRIMP KING vessels. For each of the First Preferred Ship Mortgages executed under the Title Xi program, Buck Simpson also executed six Promissory Notes.

4.

On June 15, 1982, Texarkana Trawlers assumed the entire indebtedness and all obligations of the Promissory Notes and Mortgages as originally executed by Buck Simpson for the Title XI loans for the six SHRIMP KING vessels. On June 15, 1982, Texarkana Trawlers executed and delivered to Plaintiff six Assumptions of First Preferred Ship Mortgages on the six SHRIMP KING vessels for the Title XI loans.

5.

On April 17, 1984, the National Marine Fisheries Service of the Department of Commerce refinanced the six SHRIMP KING vessels by guaranteeing additional loans to the partnership pursuant to Title XI of the Merchant Marine Act of 1936.

6.

On April 17, 1984, as part of the

refinancing of the Title XI loans, Texarkana, Trawlers, by Edward Page Oliver, managing partner, executed and delivered to Sun Bank/Sun Coast National Association (the lender), six Promissory Notes, each for One Hundred Sixty-Six Thousand Nine Hundred Forty-five and no/100 ($166,945.00) Dollars, bearing interest at a rate of thirteen percent (13%) per annum. On April 17, 1984, Plaintiff United States executed and delivered to Sun Bank/Sun Coast six guarantees that Texarkana Trawlers' Promissory Notes would be paid. On April 17, 1984, Texarkana Trawlers secured the payment of the Promissory Notes by delivering to Plaintiff six First Preferred Ship Mortgages (the mortgages) for each of the six SHRIMP KING vessels. On April 17, 1984, the individual Defendants executed and delivered personal guarantees of the

additional partnership obligations of Texarkana Trawlers relating to the six SHRIMP KING vessels.

7.

The partnership, and the individual Defendants, would not have entered into the refinancing of the Title XI loans, including the Notes, Mortgages, and Personal Guaranties, but for the representations by duly authorized agents of the Plaintiff, including Thomas S. Allen of the National Marine Fisheries Services, that all participants in the refinancing arrangement devised and designed by agents of the Plaintiff, would be treated equally and under the same terms and conditions.

8.

The Plaintiff, acting through its agents, required Henry Singleton, Jr., to personally guarantee all of the

vessels involved in the refinancing package with the exception of the six vessels owned by the Defendants.

9.

The representation by the agents of the Plaintiff that all participants in the refinancing arrangement would be treated equally and under the same terms and conditions was a misrepresentation of a material fact and a fraudulent misrepresentation. The misrepresentations by the agents of the Plaintiff induced the Defendants into entering into the refinancing arrangement, including Notes, Mortgages and Personal Guaranties. The Defendants' reliance on such representation by the duly authorized agents of the Plaintiff was justified. The Defendants suffered injury as a result of their reliance on the Plaintiff's misrepresentations in that Defendants' vessels were subjected

to substantial risks that would not have existed had the refinancing arrangement been as represented.

10.

The risks imposed upon the Defendants as a result of the Plaintiff's fraudulent misrepresentations resulted in the complete loss of the Defendants' vessels.

11.

On May 19, 1981, Buck Simpson, now deceased, executed six Preferred Ship Mortgages for the loans issued under the Fisheries Loan Fund (FLF), under the Fish and Wildlife Act of 1956, 16 U.S.C. § 742c, in the amount of Sixty-One Thousand Eight Hundred Thirty-six and no/100 Dollars ($61,836.00) for each of the six SHRIMP KING vessels. On May 19, 1981, Buck Simpson also executed six Promissory Notes for the FLF obligations in the amount of Sixty-one Thousand

Eight Hundred Thirty-six and no/100 Dollars ($61,836.00) for each SHRIMP KING vessel in exchange for direct loans from the National Marine Fisheries Service of the Department of Commerce.

12.

On June 15, 1982, Sheila Simpson, Executrix of the Estate of Buck Simpson, transferred the six SHRIMP KING vessels to Defendant Texarkana Trawlers, and it assumed the entire indebtedness and all obligations of the Promissory Notes and Mortgages originally held by Buck Simpson for the FLF loans for the six SHRIMP KING vessels. On June 15, 1982, Texarkana Trawlers executed and delivered to Plaintiff six Assumptions of Preferred Ship Mortgages on the six SHRIMP KING vessels for the FLF loans. On June 15, 1982, the Defendants executed and delivered to Plaintiff personal guarantees of the partnership

obligation of Texarkana Trawlers relating to the six SHRIMP KING vessels.

13.

Texarkana Trawlers defaulted on the secured notes and mortgages for the FLF loans. Texarkana Trawlers' default on the FLF loans was due to the loss of Texarkana Trawlers' vessels, which loss resulted from the refinancing arrangement not being as Plaintiff represented it to be. The loss of Defendants' vessels further resulted in Defendants' inability to make payments on the FLF loans, and the eventual default on these loans. As of October 27, 1986, the outstanding balance of the six FLF Mortgages and Notes amounted to $407,879.77.

14.

As of April 17, 1984, the outstanding balance of the six FLF Mortgages and Notes amounted to

$327,373.94. On April 17, 1984, Defendants' six vessels had a total fair market value of $1,200,000.00. Had Defendants sold the vessels on April 17, 1984, rather than refinancing, $1,001,670.00 of the sales proceeds would have been applied to retire the Title XI loans. The remaining proceeds, $198,330.00, would have been applied to reduce the outstanding balance of the six FLF Notes leaving a balance of $129,043.94.

## CONCLUSIONS OF LAW

I.

The statements by the duly authorized agents of the Plaintiff to the effect that all participants in the refinancing agreement devised and designed by the National Marine Fisheries Service would be treated equally and under the same terms and conditions was a misrepresentation, that

was material and/or fraudulent, that induced the Defendants into making the Notes, Mortgages, Agreements and Personal Guaranties that made up the refinancing arrangement. The Defendants' reliance on such misrepresentations was justified. The actions by the Plaintiff constituted fraud in the inducement and resulted in damages to the Defendants. The Notes, Mortgages, Agreements and Personal Guaranties, therefore, may not be enforced by the Plaintiff against the Defendants. Restatement (Second) Contracts, §§ 151; Homelite v. Trywilk Realty Co., 272 F. 2d 688 (4th Cir. 1959); Fredonia Broadcasting Corporation, Inc. v. RCA Corporation, 569 F. 2d 251 (5th Cir.), cert. den'd., 99 S. Ct. 177, 439 U. S. 859, 58 L. Ed. 2d 167 (1978); Stone v. Lawyers Title Insurance Corporation, 554 S. W. 2d 183

(Tex. 1977).

II.

The Personal Guaranties signed by the individual Defendants are not enforceable by the Plaintiff because the Plaintiff was a participant in the fraud that led to the execution of the Personal Guaranties. Standard Surety & Casualty Co. v. Olson, 150 F. 2d 385 (8th Cir. 1945); United States v. Basil's Family Supermarket, Inc., 259 F. Supp. 139 (S. D. N. Y. 1966); First Nat. Bank, Henrietta v. Small Business Admin., 429 F. 2d 280 (5th Cir. 1970).

III.

Defendants are liable to Plaintiff for the outstanding balance of the six FLF Mortgages and Notes as of April 17, 1984, less the sum of $198,330.00, plus interest at the rate of 9.09%.

It is hereby ORDERED AND ADJUDGED that the Plaintiff have judgment against

Defendants for the outstanding balance of the six FLF Mortgages and Notes as of April 17, 1984, less the sum of $198,330.00, for a balance owing of $129,043.94, plus interest at the rate of 9.09% until date of Judgment; and that the Plaintiff take nothing from the Defendants on the refinancing of Title XI loans; and that the Defendants shall recover their costs expended herein.

SIGNED AND ENTERED this 13 day of February, 1987.

/s/ Joe J. Fisher
UNITED STATES DISTRICT JUDGE